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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No. 544

BORO HALL CORP.,

Plaintiff-Petitioner,

against

GENERAL MOTORS CORPORATION, GENERAL MOTORS SALES CORPORATION, WILLIAM E. HOLLER, ALFRED P. SLOAN, JR., WILLIAM S. KNUDSEN, DONALDSON BROWN, and JOHN THOMAS SMITH,

Defendants-Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

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HARRY J. MCDERMOTT,
Of Counsel.

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Defendants-Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, BORO HALL CORP., respectfully represents:

Summary Statement of Matter Involved

This case presents the question whether on a motion to dismiss an action because the complaint fails "to state a claim upon which relief can be granted" under Rule 12(b) (6) of the Rules of Civil Procedure (28 U. S. C. A. foll. Sec. 723(c); printed in Appendix to Brief), the sufficiency of the claim is to be tested by the allegations

of the complaint (following the practice upon demurrer and that under Equity Rule 29—*Polk Company* v. *Glover*, 305 U. S. 5, 9), or whether there may now be taken into account factual matter going beyond the complaint, presented by a defendant in affidavits. There is a wide difference of opinion on this subject, the decisions of the Circuit Courts of Appeals are in conflict, and the subject has not been considered in any reported decision of this Court.

Corollary questions are: (a) Does the complaint on its face state a cause of action for treble damages under the Anti-Trust Acts (15 U. S. C. A., Sec. 1 et seq.; printed in Appendix to Brief); and (b) if consideration of respondents' affidavit was permissible, did the Court err in determining that the restraint complained of was reasonable.*

Petitioner instituted the action to recover treble damages under the Sherman and Clayton Anti-Trust Acts (15 U. S. C. A., Sec. 1, et seq.). Respondents filed no answer, but moved for an order dismissing the action "because the complaint fails to state a claim, in law or in fact, upon which relief can be granted against the defendants or any of them" (R. 16). The notice of motion is worded in the language of Rule 12(b) (6) of the Rules of Civil Procedure. No demand was made for summary judgment under Rule 56. However, the respondents annexed an affidavit and exhibits to their motion papers and stated that they were moving thereon as well as on the complaint (R. 16). Judge Conger in the District Court was doubtful whether the affidavit could be considered (R. 126, 37 Fed. Supp. 1000) and said:

> "The point has been raised and argued that, in considering this motion, the court is limited to the complaint and may not consider the affidavits and ex-

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* This petition is addressed solely to the dismissal of the first cause of action, and no review is sought as to the second cause of action.

> hibits that have been submitted. I am aware that a controversy has existed as to this from the very inception of Rule 12(b), Federal Rules of Civil Procedure, 28 U. S. C. A. following section 723c. Because it is not necessary to the determination here I shall not pass upon the question, but shall limit myself to the complaint."

However, in dismissing the complaint, he took into consideration the contract which had been annexed to the defendants' affidavit, saying:

> "I will consider, however, the 'selling franchise' or 'agreement', which is attached to defendants' papers because, except for a disagreement as to whether it is one or the other of the above, its terms are apparently not in dispute, and because it is revealing as to the true relationship that existed between the parties."

In the Circuit Court of Appeals, Judge Augustus N. Hand, writing for the majority, said (R. 142; 124 F. 2d 822, at 823):

> "We see no reason why the application should not be treated as one for summary judgment under Section 56 of the Rules of Civil Procedure. But even if the motion were regarded as made under Section 12(b) of the rules, we have held that affidavits might be employed. *Central Mexico Light & Power Co.* v. *Munch,* 116 F. (2d) 85, 87. See also *Gallup* v. *Caldwell,* 120 F. (2d) 90, 92 (C. C. A. 3)."

The District Court dismissed the complaint without leave to amend. The opinion is reported in 37 F. Supp. 999 and appears at pages 124-129 of the Record. An order of dismissal was entered on April 4, 1941 (R. 130-132) and judgment was entered thereon April 15, 1941 (R. 132, 133). On appeal the Circuit Court of Appeals for the Second Circuit (R. 134-135) the judgment was affirmed by a divided Court (R. 303). The opinion of the majority of the Court appears at pages 142-144 of the

Record and that of Judge Frank dissenting at page 145 of the Record. These opinions are reported in 124 F. 2d 822. Thereafter, petitioner applied for rehearing (R. 146-153) which was denied by the Court (R. 302-303). The opinion on the petition for rehearing appears at pages 301 and 302 of the Record and is reported in 130 F. 2d 196. The order of affirmance was entered August 26, 1942 (R. 303).

The holding of the District Court was that the complaint was defective in that its allegations did not demonstrate any restraint on interstate commerce and that it failed to set forth such a restraint as would, in any event, constitute a violation of the Anti-Trust Laws (R. 127).

The majority of the Circuit Court of Appeals in affirming the judgment on the first cause of action, predicated its decision upon the view that the proof disclosed no unreasonable interference with competition (R. 143). Concerning this cause of action, they made no reference to a lack of allegation of interstate commerce. In affirming the second cause of action, the majority stated specifically that the acts were plainly intrastate and did not affect interstate commerce (R. 144).

Judge Frank, in dissenting, expressed the opinion that the question was one which should be determined at a trial. His view is that the case should be reversed in order to permit petitioner to amend by inserting more explicit allegations as to the burden on interstate commerce if that were necessary (R. 145).

The Complaint

Petitioner had for many years been engaged in the business of buying and selling both new and used automobiles in Brooklyn, New York City (R. 7, 8). The respondent General Motors Corporation was a manufacturer of auto-

mobiles which it sold through its wholly-owned subsidiary, the respondent General Motors Sales Corporation (R. 6).

The Sales Corporation's method of selling automobiles was through franchise agreements with dealers, in some of which General Motors had a financial interest (R. 6, 7, 8). Reference is made particularly in this connection to an investment by General Motors in the Hetzer Chevrolet Sales Co. Inc. located in Brooklyn (R. 8).

The individual respondents, other than Holler, were officers of General Motors Corporation, and the respondent Holler was General Manager of the Chevrolet Motors Division of the Sales Corporation. These individual respondents were also members of a Dealer Relations Board, to which reference will be made later (R. 4-6).

In the latter part of the year 1933, and thereafter until September 1, 1940,* petitioner operated under a franchise from the corporate respondents whereby it was allotted for the sale of new Chevrolet automobiles a "non-exclusive selling franchise in the territory known as the New York Zone" (R. 7), an area including the entire State of New York and a portion of the State of New Jersey (R. 7).

In addition to selling these new Chevrolet cars, petitioner dealt in used cars not acquired from the respondents. They were cars which petitioner had accepted in trade and for which it had granted allowances to purchasers of new cars and of other used cars (R. 8). Some of them were not even of the type manufactured by General Motors.

Although the petitioner's franchise was for the New York Zone, the respondents arbitrarily demarcated for the petitioner a more limited area in the downtown section of Brooklyn which it called a "Zone of Influence" (R. 8-9).

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* During that period its corporate name was Boro Hall Chevrolet, Inc. (R. 6, fol. 18).

The gravaman of petitioner's complaint is that respondents refused to permit it to open a used car outlet (salesroom or lot) outside of this limited "Zone of Influence."

This restraint is alleged to have been part of a plan whereby the respondents restrained trade in used cars, not only of the petitioner, but of other General Motors dealers who were likewise required to confine the location of their used car outlets to their respective Zones of Influence. This, it is alleged (R. 9, fol. 26), favored the dealers in which the corporate respondents had financial investments.

Petitioner says that obedience to this scheme was enforced by the respondents in various fashions. Written contracts were made for the term of one year with the reservation of the right to cancel without cause; the contracts required dealers to sell a certain number of cars, but the right was reserved to the corporate respondents to refrain without cause from delivering cars. Recalcitrant dealers were threatened with cancellation of their franchise agreements or with a refusal to furnish cars (R. 9).

The respondent Sales Corporation refused to permit the petitioner to establish a used car outlet outside its Zone of Influence, whereupon an appeal was taken to the respondent Holler, who refused to grant permission to open an outlet except with the approval of a Regional Manager (R. 9-10). An appeal was then taken to the Dealer Relations Board of General Motors Corporation consisting of the respondents Sloan, Knudsen, Brown and Smith, and their decision was that a location for a used car outlet should not be "unduly prejudicial" to the interests of other dealers (R. 10-11).

The complaint alleges (R. 11):

> "34. That by reason of the conspiracy of the defendants and each of them to restrain trade in used cars, the plaintiff has been demaged in that it was unable to liquidate its used cars; that its inability to

liquidate its used cars prevented it from buying new Chevrolet automobiles and made it impossible for it to accept orders for new automobiles which it might otherwise have obtained; that its investments in buildings, alterations, leases and equipment were depreciated in value; and that it was injured in its business and property."

Damages are asked in the sum of $250,000.00.

Respondents' Affidavit

The affidavit submitted on behalf of the respondents is devoted mainly to a recitation of the exhibits annexed thereto. It states that petitioner terminated the selling agreement effective September 1, 1940, and that this was accepted by General Motors (R. 21; Exh. 9, R. 88; Exh. 10, R. 89).

An announcement of the creation of the Dealer Relations Board in January, 1938 (Exh. 1, R. 24-34), a document prescribing the procedure before this Board (Exh. 2, R. 35-44), and a specimen contract between General Motors and the petitioner (Exh. 3, R. 44-82) are likewise attached to the affidavit. None of these documents referred to "Zones of Influence" or to limitations of outlets for the sale of used cars. They make no provision regulating sales of used cars.

The Zone of Influence is shown on a map (Exh. 7, R. 85) and there are letters addressed to Chevrolet Motor Division by the petitioner which relate mainly to a complaint about the location of other dealers' sales rooms near its place of business (Exhs. 11, 13 to 15, R. 89-101). However, one of the letters does state that the petitioner was stopped from establishing used car lots outside of its territory (R. 98).

Another exhibit is the decision of the respondent Holler which refers to the complaint concerning the opening of

sales rooms by other dealers, and which, in connection with Holler's decision about the used car outlet, states the following (Exh. 19, R. 109):

> "It was further the decision of the Committee that you may, with the approval of Mr. K. M. Chase, Regional Manager, establish a Used Car outlet outside of your present Zone of Influence, which will enable you to sell used cars in greater volume."

Exhibit 26 (R. 117-119) is the letter of the respondent Sloan containing the conclusion reached by the Dealer Relations Board. Relative to the location of used car outlets, this letter says (R. 118):

> "Likewise, you feel that you should have greater flexibility in the location of used car lots outside your so-called sphere of influence.* * *"

And at page 119:

> "With reference to the used car lot to be located outside of your zone of influence, the Board understands that that has been approved, in principle, by Chevrolet, and we feel that that should be a part of the decision, with the understanding, of course, that a location should be agreed upon that meets your viewpoint, and at the same time is not unduly prejudicial to the interests of the other dealers."

Reasons Relied on for the Allowance of the Writ

The Circuit Court of Appeals has decided important questions of Federal law which have not been, but should be, settled by this Court.

(a) In its interpretation of Rule 12 (b) (6), the Circuit Court of Appeals has rendered a decision in conflict with the decisions of other Circuit Courts of Appeals on the same matter. Contrary views were expressed in:

> *Cohen* v. *United States* (C. C. A. 8th, August, 1942), 129 F. 2d 733, 735 et seq.;

Continental Collieries v. *Shober* (C. C. A. 3d, Sept. 1942), 130 F. 2d, 631, 635-636, points 16-17.

Gallup v. *Caldwell* (C. C. A. 3d, 1941), 120 F. 2d 90, 92-93, points 1, appears to be in accord with the present decision.

The District Courts have rendered decisions each way and the text writers are in hopeless conflict. The decisions on both sides of the question are collected in the accompanying brief, Point I, where reference is likewise made to the discussions of the text writers. Concerning the importance of this question, there can be no doubt. If the practice on motions to dismiss for insufficiency of statement has been so radically changed, and the courts are no longer confined to the allegations of the complaint itself (see *Gibbs* v. *Buck*, 307 U. S. 66, 76; *Polk Company* v. *Glover*, 305 U. S. 5, 9), it is of the utmost importance that the conflict among the Circuit Courts of Appeals and in the District Courts be resolved.

(b) Moreover, the Circuit Court of Appeals has decided on affidavits alone that the respondents' practice of exercising control over the location of dealers' used car salesroom was reasonable and that the refusal to permit petitioner to maintain a salesroom for used cars outside its Zone of Influence without respondents' consent was likewise reasonable. We urge that the question of reasonableness is one of fact, or at least a mixed question of fact and law. Strangely enough, there does not appear to be any direct ruling by this Court on this subject. However, this Court has held that in the determination of the reasonableness of a restraint, "each case demands a close scrutiny of its own facts." *Sugar Institute* v. *U. S.*, 297 U. S. 553, at 600.

The close scrutiny so required, we submit, is a factual one. Where the restriction is admitted and the control is

exercised in relation to property in which respondents have no direct interest, the question of reasonableness is one for the jury or other trier of the facts and should not be determined as a matter of law. Accordingly, we urge that the question of federal law so presented is of public importance and should be settled by this Court.

Questions Presented

1. In deciding a motion to dismiss a complaint for "failure to state a claim upon which relief can be granted" (Federal Rules of Civil Procedure Rule 12(b)(6)), may the Court consider facts not in the complaint, but presented by defendant's affidavit?

2. Does the complaint on its face state a cause of action for treble damages under the Anti-Trust Acts (15 U. S. C. A., Sec. 1 et seq.)?

3. If consideration of respondents' affidavit was permissible, did the Court err in determining that the restraint complained of was reasonable?

Jurisdiction

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, c. 229, § 1 (43 Stat. 938); 28 U. S. C. A. Sec. 347.

Finality of Proceeding

The judgment in the case at bar is final. No leave to amend the complaint has been granted, with the result that the judgment operates as an adjudication upon the merits (Rules of Civil Procedure 41(b)).

WHEREFORE petitioner prays that a writ of certiorari may issue out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the 2nd Circuit, commanding the said Court to certify and send to this Court for review and determination, as provided by law, this cause and a complete transcript of the record and of all proceedings had herein; and that the order of the United States Circuit Court of Appeals affirming the judgment in this cause may be reversed and that the petitioner may have such other and further relief in the premises as this Court may deem proper.

Dated November 24th, 1942.

BORO HALL CORP.

By ALFRED J. GIORDANO
President,
Petitioner.

ARTHUR GARFIELD HAYS,
Counsel for Petitioner.

State of New York,
County of New York, } ss.:

I hereby certify that I have examined the foregoing petition for a writ of certiorari and that in my opinion it is well founded and the cause is one in which the petition should be granted.

ARTHUR GARFIELD HAYS,
Counsel for Petitioners.